

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE SOUTHERN DISTRICT OF TEXAS

3 HOUSTON DIVISION

4 VITOL INC. § CASE NO. 21-6006
§ HOUSTON, TX
5 VERSUS § FRIDAY,
§ AUGUST 26, 2022
6 ARTHUR JACOB BRASS § 2:31 P.M. TO 2:57 P.M.

7 MOTION

8 BEFORE THE HONORABLE CHRISTOPHER M. LOPEZ
UNITED STATES MAGISTRATE JUDGE

9 APPEARANCES:

10 11 FOR THE PARTIES: SEE NEXT PAGE

12 COURT REPORTER: ZILDE MARTINEZ

13 COURT CLERK: ZILDE MARTINEZ

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1 APPEARANCES:

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(APPEARING TELEPHONICALLY)

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1 HOUSTON, TEXAS; FRIDAY, AUGUST 26, 2022; 2:31 P.M.

2 THE COURT: Okay, good afternoon, everyone. This is
3 Judge Lopez. Today is August 26th. I'm going to call the 2:30
4 hearing into an emergency motion to quash a subpoena in Vitol
5 v. Brass. Let me go ahead and take appearances. Who wishes to
6 make an appearance on behalf of the Plaintiff, Vitol Inc.? Mr.
7 Aurzada, you're on mute.

8 MR. AURZADA: Good afternoon, Your Honor, Keith
9 Aurzada and Michael Cooley on behalf of Vitol, Inc. Thank you.

10 THE COURT: Okay. Good afternoon. Ms. Goott, I see
11 you there. Good afternoon.

12 MS. GOOTT: Good afternoon, Judge.

13 THE COURT: Okay. Anyone wish to make an appearance
14 on behalf of Zadok?

15 MR. ROBIN: Yes, (indiscernible). Oh I'm sorry.
16 Yes, this is Jeffrey Robin. I am Counsel for Zadok.

17 THE COURT: Okay.

18 MR. ROBIN: And Mr. Segev Zadok is also joining
19 today's hearing.

20 THE COURT: Okay, good afternoon to both of you.
21 Anyone else wish to make an appearance?

22 MR. BEATTY: Yes, Your Honor. Max Beatty on behalf
23 of the Trustee. (indiscernible) the Trustee is here with me
24 today. Given the fact that (indiscernible) an issue or the
25 issue raised was about the subpoena that we sent, we thought we

1 would appear in case (indiscernible).

2 THE COURT: Okay. Thank you. Okay, Mr. Robin, you
3 filed the motion, you get to go first.

4 MR. ROBIN: Zadok received service of this subpoena
5 yesterday in the early afternoon. I was retained shortly
6 thereafter and immediately contacted both Plaintiffs and
7 Counsel with respect to this subpoena. We have a trial set on
8 August 30th. And I informed both Plaintiffs and Defendants
9 that Zadok was seeking to quash the subpoena on an emergency
10 basis given the constraints between now and the trial.

11 Three business days' notice to comply with the trial
12 subpoena that was served completely by surprise to Zadok, and
13 for the reasons we expanded upon in our motion, we believe that
14 there are bases to quash the subpoena for undue hardship and
15 inconvenience expense. And due to the lack of time to comply.

16 In addition, Zadok has produced documents in this
17 case back in July, July 28th. There is no reason why Plaintiff
18 could not have subpoenaed Zadok to appear at trial after they
19 had received service of those documents, or even earlier, when
20 the Plaintiffs knew of this trial setting as early as July of
21 this year, because the trial order was agreed upon and
22 submitted for entry and it was signed by the Court on July
23 19th.

24 So it's perplexing to Zadok why the Plaintiff waited
25 until three business days before the trial setting to serve a

1 trial subpoena. At all times, Zadok has cooperated with the
2 document requests. There's been no suggestion that Zadok
3 wouldn't cooperate in any discovery in execution of a business
4 records affidavit.

5 And Mr. Zadok is here to testify as to those issues
6 and to serve his receipt of service and subpoena. Mr. Zadok is
7 scheduled to travel on a business trip starting on Monday, and
8 he returns from that trip out of state, he's returning late in
9 the evening after hours on Tuesday August 30th, and the trial
10 has already begun. And he's already incurred expenses with his
11 trip.

12 And Mr. Zadok will have no time between now and the
13 trial to get prepared with Counsel because he's getting ready
14 for his trip. And so, for those reasons, the others that we
15 have provided in our emergency motion, we believe this does
16 constitute an emergency. The subpoena should be quashed.

17 And we'd be happy to further discuss any other
18 concerns. We do want to cooperate, but at the same time, we're
19 just putting this -- we were placed in this situation not by
20 our own doing, but by the circumstances that were presented on
21 us.

22 THE COURT: Okay, let me -- Ms. Goott, you also filed
23 a response in support of the motion to quash. I think it makes
24 sense for you to go and then I'll hear from the other side. So
25 I have everyone's papers, I'm just giving everyone an

1 opportunity. Thanks everyone for filing their responses on
2 very short notice.

3 But I thought it made sense to hold the hearing today
4 because if Mr. Zadok is going to fly out on Monday or scheduled
5 to be out, (indiscernible) day to make a decision, so I thought
6 it made sense. So let me hear from you, Ms. Goott, and then
7 I'll turn to Vitol.

8 MS. GOOTT: Thank you, Judge. And can you hear me
9 okay? I'm hearing a little bit of static.

10 THE COURT: Just fine. Thank you.

11 MS. GOOTT: Great. And I don't want to waste
12 anybody's time and repeat what was in my response, but I
13 appreciate Zadok's position that it's untimely. It's three
14 days before trial when we've had this date set for well over a
15 month. And furthermore, the docket shows that Vitol had time
16 to serve other parties with trial subpoenas with sufficient
17 notice, and they didn't do it here.

18 And in their response, Vitol talks about how this
19 isn't their fault, that they shouldn't be held accountable to
20 comply with these rules. But the reality is, they caused this
21 problem themselves. They have known about this issue that they
22 claim for quite a while and to serve them three days before
23 doesn't comply with the rules.

24 But I think that we need to take one step back and
25 before we even get to the issue of whether or not it would be

1 an undue burden on Zadok and whether it was timely filed. The
2 issue is, is that none of this gets to come in anyway. They
3 didn't disclose Zadok in the initial disclosures.

4 They said, hey, we didn't know. We didn't find out
5 about this until two months ago. Okay. Assume that's true.
6 If they only found out about it two months ago, these lawyers
7 know exactly what to do because they've done it before in this
8 adversary and they come to the Court and say, Judge, we just
9 found out Zadok is a crucial witness, open discovery.

10 But discovery has been closed since February. They
11 did that with Mr. (indiscernible). They came to Court without
12 evidence and said, please, let us tell you why this is so
13 important. And the Court granted it. They know how to do it,
14 but they didn't do it here. They didn't come to Court and say,
15 Judge, we just found this out.

16 They weren't even the ones that served the subpoena,
17 and that's fundamentally unfair. The Trustee who is not a
18 party to this case serves the subpoena, gets documents, and
19 then takes these alleged documents and shares them with the
20 Plaintiff. And the Plaintiff says, now I'm going to use
21 documents that I received after the close of discovery that
22 I've known about for a few months?

23 And then they send me a notice, oh, we're going to
24 use the business records affidavit. We don't get to use a
25 business records affidavit. We don't get to bring a witness

1 and you sure don't get to produce documents that were obtained
2 after discovery was closed. It's such an important thing. You
3 would have come to this Court and said, Judge, this is what we
4 think.

5 Let us talk to Mr. Zadok. Let us find out who made
6 these purchases. But what do they do? They file a response
7 today. And they put all of the facts that are not admissible
8 before the Court. It's so inappropriate for them to file a
9 pleading and say, Judge, we're going to tell you everything
10 that we think that this guy did was wrong without him having to
11 comply with the rules of evidence, without having to comply
12 with the rules of procedure, because now you know what they
13 think without a witness.

14 But Rule 37(c) says that this does not come in. And
15 then it cannot be permitted to come in at trial when it wasn't
16 disclosed. Initial disclosure specifically states, if you find
17 something out, supplement it. They didn't do any of it. And
18 to come in three days before trial and say, surprise, we're
19 going to have Mr. Zadok come in, we didn't get to depose Mr.
20 Zadok.

21 I couldn't have. Discovery was closed. They didn't
22 even depose Mr. Zadok. But what did they tell you in their
23 response? Judge, it's not our fault. Really? Whose fault is
24 it that we didn't do this timely? It's Miriam Goott's fault.
25 She's trying to -- I don't even remember the language that they

1 used, but it must be my fault because I'm asking them to comply
2 with the rules of evidence. It's totally inappropriate. And I
3 ask the Court, I support Zadok's motion to quash. Thank you.

4 THE COURT: Thank you. Anything from Vitol?

5 MR. AURZADA: Your Honor, thank you very much. Keith
6 Aurzada for Vitol. First, I can totally appreciate where Mr.
7 Robin is coming from. Zadok really doesn't need to come to
8 testify at the trial because the business records affidavit is
9 sufficient all by itself. And I'm going to address that in a
10 minute.

11 I'm going to address a couple of other things first.
12 First of all, there can be no argument that there is surprise
13 here. Mr. Brass himself engaged in the transaction in 2017.
14 He knows about these records. These are his records. These
15 are records that reflect his own transaction. So it's not like
16 an unfair surprise. The issue of disclosure is interesting me,
17 Your Honor, because Mr. --

18 THE COURT: Well, the issue is unfair surprise to Mr.
19 Zadok about appearing at trial, all right? That's what I'm
20 focused on. I'm just telling everyone now.

21 MR. AURZADA: Okay. So --

22 THE COURT: Because that's the motion in front of me.

23 MR. AURZADA: I'm going to say one other --

24 THE COURT: In other words, that's the motion that's
25 before me, right? That's what Mr. Robin filed, so that's where

1 my focus is.

2 MR. AURZADA: Okay. Then Your Honor, this is where I
3 would focus your attention, then. Rule 90211 talks about the
4 admission of business records affidavits. The Fifth Circuit
5 has said consistently that certificates from a records
6 custodian attract the language of Rule 8036 nearly word for
7 word render the records self-authenticating that US versus --
8 I'm going to butcher the last name -- Ayelotan, 917 F.3d 394
9 (indiscernible) cite to Page 402 Fifth Circuit, 2019.

10 When accompanied by a custodial certification, the
11 live testimony of the custodian for another witness is not
12 required to admit the records. That would alleviate Mr. Zadok
13 from having to testify at the trial. What are we reacting to?
14 We're reacting to Ms. Goott's statement at the pre-trial day,
15 the day before yesterday that she wants to cross-examine the
16 witness but sign the affidavit.

17 Presumably, she has some cross-examination that's
18 going to elicit a response from Mr. Zadok that the records he
19 produced are not his business records. Now, if that's true and
20 she can elicit that testimony, these records won't come in
21 because that would mean that the affiant was not telling the
22 truth when he signed it.

23 It -- this is important evidence to my client, Your
24 Honor. This is important evidence that meets one of the
25 (indiscernible) factors. How did we find out about this

1 evidence? We received a call or learned of this after
2 discovery had closed and they were records of the affiliate
3 Debtor GCAC in storage unit, where (indiscernible) from my
4 office flew to Houston and looked at the records with Mr.
5 Beatty.

6 Ms. Goott was invited to that, to look at those
7 records. The Trustee, based upon that issue to subpoena
8 (indiscernible) end of July, we received the business records
9 affidavit plus 109 pages from (indiscernible). Now in the year
10 '26, disclosures, Mr. Brass did not disclose this.

11 My client would've had no way of knowing that these
12 transfers existed or that the scope of the records. And so, we
13 (indiscernible) witness and exhibit list like the pre-trial
14 order said. And by the way, on that score, the Rule 26 talks
15 about when do you disclose unless -- and the specific word is,
16 wording is, unless otherwise ordered by the Court. And so, we
17 did that.

18 So to the main thrust here, I get where Mr. Robin is
19 coming from. Apparently Mr. Zadok is available to testify
20 right now. I'd be willing to have him testify to these
21 business records right now and the he doesn't have to worry
22 about his trip. Because all I'm going to ask him is did you
23 say the truth in your affidavit and are these your business
24 records. And that's the end of my request for testimony.

25 We can do that right now. We don't even need to wait

1 for trial. And so, with that, Your Honor, the trial subpoena
2 is appropriate. This is evidence that the Court needs to hear.
3 And that's all I have to say, Your Honor, that plus what's in
4 our papers. Thank you.

5 THE COURT: Thank you. Anyone else wish to be heard?

6 MS. GOOTT: May I respond, Your Honor?

7 THE COURT: Sure. Yes.

8 MS. GOOTT: Mr. Aurzada did not answer your question.
9 There is no response to why Mr. Zadok was served three business
10 days before trial. All he wants to argue is why you should
11 allow a business records affidavit, but that also is not before
12 the Court. In fact, the Court already rules that we're going
13 to deal with those at trial. We have no evidence that the
14 documents that were produced were even business records.

15 They just want you to assume that. But what they
16 don't address is the fact that these documents that they want
17 in were produced far after the discovery cutoff, wholly
18 prejudicial, and no response as to why this was served three
19 days before trial when they knew about the trial date for over
20 a month, where they served other witnesses, other third party
21 banks with trial subpoenas, but they didn't serve Zadok. Thank
22 you, Judge.

23 THE COURT: Anyone else wish to be heard? Okay. So
24 before the Court is an emergency motion to quash the subpoena
25 for trial. Was filed by DZ Jewelry LLC. It was filed earlier

1 today. The Court is going to grant emergency consideration of
2 the motion in light of a pending trial scheduled. Today's
3 Friday August 26th. A trial is scheduled for next Tuesday
4 August 30th.

5 So I'm going to find the Court has jurisdiction to
6 consider this motion, that's certainly a core proceeding as it
7 relates to an adversary regarding the dischargeability of debt.
8 Ad hoc seeks to quash a subpoena that was -- no party disputes
9 was received by Zadok on August 25th.

10 The ad hoc seeks to quash this subpoena under Federal
11 Rule of Civil Procedure 45, which I would note is made
12 applicable in this adversary proceeding under Federal Rule of
13 Bankruptcy Procedure 9016. There's no question that the trial
14 is scheduled to begin next Tuesday and that Vitol has provided
15 the ad hoc approximately three business days' notice of a trial
16 to testify.

17 Mr. Zadok has indicated that no party has contested.
18 Mr. Zadok is going to be out of town beginning -- and is
19 scheduled to arrive back in town on Tuesday August the 30th,
20 which is the day the trial commences. So that's kind of where
21 we are. So what does the law have to say kind of about where
22 things stand.

23 To that, I'd note that under Federal Rule of Civil
24 Procedure 45, again, which is made applicable under Rule 9016,
25 the party may serve a subpoena, all right, that commands a

1 nonparty to testify to attend and to testify at a trial. And
2 that subpoena is issued under Rule 45(c).

3 Certainly, this subpoena was issued, and there's no
4 question about that. So the question is whether this can be
5 quashed. This ad hoc points to two points here. And I want to
6 make sure -- I'm just looking at your pleading to make sure
7 I've got it -- I have it right.

8 Justify -- they're objecting to the timing and to the
9 undue burden standard. I know that Rule 45(d)(3)(a) motion the
10 Fifth Circuit has held. If you look at the (indiscernible),
11 the Royal Dutch Petroleum Company decision 392 F.3d 812 of
12 Fifth Circuit 2004 case. And a motion to quash to modify a
13 subpoena, the Northern Party has the burden of proof.

14 They certainly believe that there's been satisfaction
15 of that, right? Looking at the notice that has been provided
16 under the circumstances and the travel schedule, I certainly
17 believe that there has been certainly there. And on a motion,
18 there's two kind of points that, as I understand Mr. Robin is
19 arguing on behalf of his client.

20 One is the unreasonable notice, and two, the undue
21 burden standard here. And I think he satisfies both. I think
22 providing three days' notice of a subpoena to testify in a
23 trial is certainly very little notice and there are cases in
24 the Fifth Circuit. I'm happy to cite some if you need some,
25 providing very short notice of a time to testify in trial is

unreasonable and overly burdensome and oppressive and three days' notice.

3 And apparently receiving it on a Thursday to come
4 testify in a trial, in a contested trial on a Tuesday is
5 certainly burdensome. (indiscernible) is an undue burden. No
6 question about that and no one should be forced to fly back on
7 a Tuesday and show up and testify but show up and testify on
8 one day and then give a testimony on the next day.

9 When do you have time to prepare with your counsel?
10 When do you have time to think about these issues? Mr. Aurzada
11 notes that he only wants him for a specific purpose, but you
12 know, that doesn't mean that a witness shouldn't have the
13 appropriate time to prepare for a testimony at trial. So I'm
14 going to grant the motion to quash.

15 (Motion to quash granted).

16 THE COURT: Apparently it -- testimony is not really
17 even needed because parties are going to make a business record
18 argument. That's going to be reserved for trial. And as well
19 as Mr. Goott's argument that it doesn't come in under 7037. So
20 everybody's rights are preserved at trial.

21 I would note that the Fifth Circuit case law, and if
22 you look at the (indiscernible) case, it also notes that you
23 know, modification of a subpoena is also appropriate. But the
24 trial is currently scheduled for two days. If the trial goes
25 out further to another day, and maybe the subpoena could be

1 modified to permit trial on another date.

2 I'm not available on September 1st, Mr. Robin. So
3 but your client won't have to show up on the 30th or the 31st.
4 If this gets pushed out to another date, maybe it's appropriate
5 to have your client. But everybody's rights are going to be
6 preserved.

7 But before your client has to come forward and
8 testify, I think I would need to take up, and despite Ms.
9 Goott, you're going to have to tee the issue up if that's what
10 you want, whether it comes in or not, whether it --
11 (indiscernible) should be struck as a witness. And I'm not
12 ruling on that one way or the other.

13 I'm just saying, I don't want a witness to come here
14 to testify in person and then if that issue is going to get
15 teed up, if the issue gets teed up, then either I'll deal with
16 it at trial and do the business records affidavit issue when we
17 meet next Tuesday or Wednesday.

18 And but if this gets pushed out and you know, he's
19 available, then I'll certainly entertain a motion to strike and
20 certainly give everyone the opportunity. I do note, I'm a
21 little surprised that we're dealing with this at the 11th hour.
22 I do note that I did extend discovery. And that was --
23 somebody filed a motion on a Tuesday to extend discovery and I
24 granted a motion on a Friday on three business days' notice.

25 So certainly work under (indiscernible). That

1 doesn't mean that people don't have the right to do it. I just
2 note that if anyone asks this Court for a hearing as it's
3 displayed under many hearings before this Court. And Mr. Robin
4 now knows if you want a hearing, you'll get one, and you'll get
5 one on short notice when it makes sense.

6 So that's always been what we've been doing. Maybe
7 it's not an issue. Maybe Vitol wins on the business record
8 affidavit. Maybe they don't. I will be honest with everyone.
9 And I've done it intentionally. I have not reviewed any
10 exhibits. I haven't looked at one of them.

11 I'm going to take them up, and if they come up, I
12 don't want to -- I'm only going to review the evidence that
13 gets admitted into the record and look to file stuff on the
14 docket. I will see what Vitol presents in the form of their
15 evidence and I will review it at that time so everyone's rights
16 are preserved.

17 But I'm going to grant a motion to quash, certainly
18 to testify as to the 30th and the 31st. I believe that the
19 Fifth Circuit case law there is certainly an undue burden
20 there. And I don't think modification on three business days'
21 notice is appropriate. But if it goes further out, then maybe
22 that changes. Mr. Robin, do you have any questions about my
23 ruling?

24 MR. ROBIN: No, Your Honor.

25 THE COURT: Does anyone have any questions? Okay.

1 All right.

2 MR. ROBIN: No, Your Honor.

3 THE COURT: Thank you. That's my ruling. I'll enter
4 a short order on the docket. Folks continue to talk. I really
5 strongly encourage it. All righty. Thank you. We'll see each
6 other on Tuesday.

7 MAN: Thank you, Judge.

8 (Hearing adjourned at 2:57 P.M.)

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RULINGS

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1 C E R T I F I C A T I O N
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3 I, Sonya Ledanski Hyde, certified that the foregoing
4 transcript is a true and accurate record of the proceedings.

5 *Sonya M. Ledanski Hyde*
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8 Sonya Ledanski Hyde

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Date: August 29, 2022